Supreme Court of the United S

OCTOBER TERM, 1894.

LEHIGH MINING AND MANUFACTURING COMPANY

vs.

JOHN PAUL, Judge, &c.

MOTION FOR MANDAMUS.

C. T. DUNCAN,
F. S. BLAIR,
H. S. K. MORRIS.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

LAW ASSOCIATION
PHILADELPHIA

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1894.

LEHIGH MINING AND MANUFACTURING COMPANY

vs.

JOHN PAUL, JUDGE, &c.

MOTION FOR MANDAMUS.

The plaintiff in this petition asks the Court by the high extraordinary writ of mandamus to compel the Hon. John Paul, judge of the district court for the western district of Virginia, sitting as the circuit court for said district, to certify to this Court a question of jurisdiction arising out of a case recently decided by the circuit court for the western district of Virginia, in a controversy then pending in said court, in which the petitioner here was the plaintiff and J. J. Kelly *et als.* were the defendants.

The facts upon which said petition is based are as follows: In the early part of the year 1893 the plaintiff in this petition, The Lehigh Mining and Manufacturing Company, instituted its action of ejectment in the circuit court of the United States for the western district of Virginia against J. J. Kelly, Jr., James C. Hubbard, Leroy Day, Mary C. Johnson, Benjamin Williams, John Williams, Peter Gilly,

James Lewis, Benjamin Mitchel, Alfred Witt, Daniel Short, Charles S. Hale, L. H. Vaughan, and S. D. Ferguson, all of whom except the said J. J. Kelly, Jr., were tenants and lessees of the said Kelly, the object of which was to recover the land described in the declaration.

Afterwards, to wit, on May 12, 1893, said defendants appeared to said action of ejectment and pleaded not guilty, and also filed two pleas to the jurisdiction of the said court. These two pleas were substantially the same, and they averred, among other things, that for ten years prior to the institution of said action of ejectment the Virginia Coal and Iron Company, a corporation organized and existing under the laws of Virginia and a citizen of Virginia, had been setting up and asserting title to the lands owned by the defendant J. J. Kelly, Jr., and described in said declaration; that immediately preceding the institution of said action of ejectment the said Virginia Coal and Iron Company, its stockholders, officers, and members, organized, under the laws of the State of Pennsylvania, the Lehigh Mining and Manufacturing Company, to whom the Virginia Coal and Iron Company conveyed the tract of land described in said declaration; that said Lehigh Mining and Manufacturing Company was organized for the purpose of taking a conveyance from said Virginia Coal and Iron Company of said tract of land, and that said Virginia Coal and Iron Company made said conveyance to said Lehigh Mining and Manufacturing Company, fraudulently and collusively, for the purpose of conferring jurisdiction of said case upon the Federal court. Issue was joined upon said pleas, and the case continued until the 30th day of May, 1894, when the issue upon said two pleas to the jurisdiction was tried by the court, his honor Judge Paul, district judge, sitting as the judge of the circuit court, upon an agreed statement of facts, which recited, among other things, that "the Lehigh Mining and Manufacturing Company in the month of February, 1893, was organized under the laws of the

State of Pennsylvania by the individual stockholders and officers of the Virginia Coal and Iron Company, a corporation organized and existing under the laws of the State of Virginia and a citizen of the State of Virginia; that the purpose in organizing said Lehigh Mining and Manufacturing Company was to take conveyance from the Virginia Coal and Iron Company of the lands for which said action was brought for the purpose of conferring jurisdiction of said action upon the circuit court of the United States for the western district of Virginia." Said agreed statement of facts further recited that in pursuance of said plan and just prior to the beginning or institution of this action said Virginia Coal and Iron Company, by conveyance duly executed, conveyed to the Lehigh Mining and Manufacturing Company all of its right, title, and interest in and to the tract of land described in the declaration; that said Virginia Coal and Iron Company owned none of the stock of the Lehigh Mining and Manufacturing Company and had no interest in said suit.

Upon the facts thus proven and the issue thus made said court, being of opinion that said action did not really and substantially involve a dispute or controversy between a citizen of the State of Pennsylvania and a citizen of Virginia, and that the plaintiff was a party collusively made for the express purpose of making a case cognizable in the Federal court, dismissed said action. Thereupon the said plaintiff in said action tendered to the court a bill of exceptions, which was signed, sealed, and made a part of the record. This bill of exceptions contains said two pleas and the evidence, the agreed statement of facts upon which said issue was tried, and on the same day said plaintiff in said action filed in said cause its assignment of errors and a petition praying for a writ of error to the Supreme Court of the United States, and the said circuit court then and there made an order awarding said writ of error and allowing said appeal.

This was all the action taken by said court and all the action it was requested to take. Said court was not asked to make an order certifying to the Supreme Court of the United States the question of jurisdiction involved, and did not make such order.

Afterwards, to wit, on November 23, 1894, at a subsequent term of said court and after the term at which the order had been made dismissing said cause for want of jurisdiction, the said Lehigh Mining and Manufacturing Company asked the Honorable John Paul, district judge, sitting as the judge of the circuit court for the western district of Virginia, to enter the order recited in the petition, which said court refused to do, and said refusal is the basis upon which your honors are asked to award against said judge a writ of mandamus peremptorily requiring him to certify to this honorable Court the question of jurisdiction involved in the case determined by said court, resulting as it did in the dismissal of the action of ejectment aforesaid.

To justify the issuance of this writ to enforce the performance of an act by a public officer two things must concur: The act must be one the performance of which the law especially enjoins as a duty and an actual omission on the part of the respondent to perform that duty. It is incumbent on the relator to show not only that the respondent has failed to perform the required duty, but that the performance thereof is actually due from him at the time of the application. It is contrary to the policy of the law that a mandamus should issue where its sole purpose and effect is to relieve the party seeking it from the consequence of his own mistakes or omissions."

14 American & Eng. Enc. of Law and note 3, page 105.

Klokke *vs.* Stanley, 109 Ill., 192.

In this case the facts very clearly show that the court was not asked to certify the question of jurisdiction involved in said cause to the Supreme Court of the United States. The court was asked to sign a bill of exceptions, to allow a writ of error, both of which it did; and upon the same, together with the assignments of error, the plaintiff saw fit to rely; and there was no omission of duty upon the part of the court in anything it was asked to do.

The writ of mandamus cannot be used as a writ of error to bring before a superior court for review the judgment of an inferior court.

Ex parte Des Moines and Minneapolis Railroad Company, 103 U. S., 794; Book 26, L. C. P. & Co., p. 461.

In this case Chief Justice Waite, delivering the opinion of the Court, said: "This application is denied, first, because it is an attempt to use the writ of mandamus as a writ of error to bring here for review the judgment of the circuit court upon a plea to the jurisdiction filed in the suit." We may say the same is the purpose of the application for said writ in this case. In the case of *Ex parte* Perry, 102 U. S., 183 to 186, that same distinguished jurist, Chief Justice Waite, said: "We cannot by mandamus correct the judicial errors committed by an inferior court in the progress of a cause. We can in this way, in a proper case, compel an inferior court to act, but cannot control its decisions while acting. In the present case it appears that the circuit court has acted on the motion of the petitioner and denied him what he asked. The object of this proceeding is to obtain from us an order requiring that court to reverse its former decision and grant the relief it has once refused. That is the office of a writ of error or an appeal and not of a writ of mandamus." It seems to us that this case is directly in point; that the very same thing is being attempted in this case as was in that. Here the court has acted on the motion made by the plain-

tiff on the 23d day of November, 1894, and has refused to grant said motion. The relief to which the party is entitled if that order was wrong is by appeal and not by way of mandamus.

But if the writ of mandamus could be used to effect the purpose of reviewing a judgment it could not be granted in this case, because the judgment rendered on the 23d day of November, 1894, on the motion of the plaintiff to certify said question of jurisdiction was plainly right. There was then no case pending in said court in which said motion could be made. The order made in said cause on the 30th day of May, 1894, dismissing said cause, was a final order, and after the close of the term at which an order has been made the court, except in case an omission has been made by the clerk, has no power to alter or amend its record or add anything to its judgment.

In the case of Sarah G. Hickman against The City of Fort Scott, 141 U. S., 775, Justice Harlan, delivering the opinion of the Court, after adverting to the general rule that the judgments, decrees, and orders of a court, however conclusive in their character, are under the control of the court during the term at which they are rendered and may be set aside, vacated, or annulled by it, said: "It is a rule equally well established that after the term has ended all final judgments and decrees of the court passed beyond its control unless steps be taken during that term, by motion or otherwise, to set aside, modify, or correct them, and if errors exist they can only be corrected by such proceeding, by writ of error or appeal, as may be allowed in a court which by law can review the decision. So strongly has this principle been applied by this Court that, while realizing that there is no court that can review its decisions, it has invariably refused all application for rehearing made after the adjournment of the court for the term at which the judgment was rendered, and this is based upon the ground that the case has passed beyond the con-

trol of the court." See also Bronson against Schulten, 104 U. S., 410.

The only way in which the action sought to be had by the motion determined on the 23d of November, 1894, could have been had was by the entry of an order *nunc pro tunc* certifying said jurisdictional question to the Supreme Court. This could not have been done, because no such action was asked, no such order was made or intended to be made on the 30th day of May, 1894, and no judgment can be entered as a *nunc pro tunc* judgment unless the order was originally made and by some misprision of the clerk or otherwise the judgment had not been entered as intended.

Black on Judgments, section ——.

Freeman on Judgments, ——.

This case comes clearly within the provision of Maynard *et als.* against Hecht, 151 U. S., 324. In that case the question presented to the Supreme Court was one of jurisdiction, and there had been a bill of exceptions to the ruling of the Court. A writ of error and an assignment of errors and the petition and the assignment raised the question of jurisdiction, but there was no certificate of the question of jurisdiction to the Supreme Court. In that case Chief Justice Fuller, after quoting the fifth section of the judiciary act of March 3, 1891, in these words, "In any case in which the jurisdiction of the court is in issue; in such case the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision," said: "According to that provision, the question involving the jurisdiction of the circuit court must have been in issue and decided against the parties seeking it and must be certified for decision, and no such question was certified by the circuit court in this case." And further on in the opinion the judge said: "A certificate by the circuit court presenting such question for the determination of this case is explicitly and

in terms required in order to invoke the exercise by this Court of its appellate jurisdiction. We are of opinion that the absence of such certificate is fatal to the maintenance of the writ of error in this case." The Court further decides that the absence of said certificate cannot be helped out by resort to the petition for writ of error nor to the assignments of errors. The Court then further said: "The inquiry is not whether we can ascertain the question sought to be presented, but whether we can exercise jurisdiction under the statute, which we cannot if the certificate is an absolute prerequisite, as we hold it to be."

This case is referred to as showing that when the court had signed the bill of exceptions and had allowed the writ of error, thus doing all that it was asked to do, that the omission to certify the question of jurisdiction resulted from the omission and failure of the plaintiff to ask for it, and not a failure of duty upon the part of the court; and such being the case, upon both principle and authority, the petition for a writ of mandamus in this case should be denied.

C. T. DUNCAN.
F. S. BLAIR.
H. S. K. MORISON.

SUPREME COURT OF THE UNITED STATES.

The Lehigh Mining and Manufacturing Company vs. *Hon. John Paul, District Judge of the United States for the Western District of Virginia, and holding the Circuit Court of the United States for said District.*	Motion to file Petition for *Mandamus.*

The Lehigh Mining and Manufacturing Company, a corporation organized and existing under the laws of the State of Pennsylvania, moves the court for leave to file the petition attached hereto, the object of which petition being to obtain a *mandamus* requiring the Circuit Court of the United States for the Western District of Virginia, and his Honor, Judge Paul, district judge, and holding the said Circuit Court, to certify to this court, pursuant to the Judiciary Act of March 3d, 1891, the question of jurisdiction which arose in an action of ejectment lately depending in said Circuit Court, wherein said Lehigh Mining and Manufacturing Company was plaintiff, and J. J. Kelly, Jr., and others, were defendants.

The question presented in the petition, briefly stated, is this: In April, 1893, the Lehigh Mining and Manufacturing Company, a citizen of Pennsylvania, instituted an action of ejectment in the court aforesaid against Kelly and others, citizens of Virginia, for the recovery of a boundary of land containing about three thousand acres lying in Wise County, Virginia, and for damages for the detention thereof.

The defendants filed pleas to the jurisdiction, alleging that the Virginia Coal and Iron Company, a citizen of Virginia,

was the real plaintiff, and that it had shortly before the institution of the suit made a transfer to the plaintiff for the purpose of giving jurisdiction to the Federal Court. Issue was joined on these pleas, and at the May Term, 1894, the case was tried by the court without a jury on this issue upon an agreed statement of facts. This statement of facts admitted that the purpose of the transfer was to give jurisdiction to the Federal Court, but also admitted that the *transfer was absolute*, and that the Virginia Coal and Iron Company had no interest in the Lehigh Mining and Manufacturing Company, no interest in said land, and no interest whatever in the result of said suit.

The court, however, Judge Paul presiding, dismissed the case for want of jurisdiction. This was done at the May Term, 1894. The plaintiff forthwith tendered a bill of exceptions which set forth all the facts, and this was signed and sealed and made a part of the record; but plaintiff failed to request the court, until after the expiration of the trial term, to certify to this court the question of jurisdiction pursuant to the Judiciary Act of March 3d, 1891. At the next term of the court, to wit, in November, 1894, the plaintiff moved the court to grant such certificate, but the court refused to do so, being of the opinion that it was unnecessary, notwithstanding the decision in Maynard *vs.* Hecht, 151 U. S., 324, and being also of opinion that such a certificate could not be made except during the trial term. The question now presented, therefore, is whether the certificate required by the fifth section of said Act of March 3d, 1891, must be made during the trial term, or whether it can be made at any time before the expiration of the time allowed for appeal or writ of error.

R. A. AYERS,
A. L. PRIDEMORE,
E. M. FULTON,
R. C. DALE,
J. L. WHITE,
J. F. BULLITT, JR.,
Attorneys for Petitioner.

SUPREME COURT OF THE UNITED STATES.

Lehigh Mining and Manufacturing Company

vs.

John Paul, District Judge of the United States for the Western District of Virginia, and holding the Circuit Court of the United States for the said District.

TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, the Lehigh Mining and Manufacturing Company, a corporation organized and existing under the laws of the State of Pennsylvania, having its chief office in the said State, and being a citizen and resident of the State of Pennsylvania, states as follows: That on April 4th, 1893, your petitioner was possessed of and for an estate in fee simple absolute of a certain tract or parcel of land lying on Powell's River and the waters thereof in the county of Wise, State of Virginia, and within the jurisdiction of the Circuit Court of the United States for the Western District of Virginia; that thereafter, to wit, on April 5th, 1893, one J. J. Kelly, Jr., James C. Hubbard, Leroy Day, Mary C. Johnson, Benjamin Williams, John Williams, Peter Gilly, James Lewis, Benjamin Mitchell, Alfred Witt, Daniel Short, Charles S. Hale, and L. H. Vaughn and S. D. Ferguson, the last two of whom were partners in trade under the firm name and style of L. H. Vaughn & Co. (which persons will hereinafter be called, for the sake of brevity, "the said defendants"), entered into the said tract of land and unlawfully withheld from your petitioner the possession thereof to the damage of your petitioner in a very large sum, to wit, the sum of $10,000; that the said defendants, and each of them, were at the time last aforesaid citizens of the State of Virginia and residents of the Western District thereof; that after the said defendants had taken possession of the said premises, to wit, on April , 1893, your petitioner, for the purpose of recovering the

possession and said damages for the detention thereof, instituted in the Circuit Court of the United States for the Western District of Virginia, at Abingdon, an action of ejectment against the said defendants; that on May 12th, 1893, the said defendants, by their attorneys, appeared in the said action of ejectment and pleaded the general issue of "not guilty," and also filed two pleas in writing to the jurisdiction of the said court, which said pleas in writing were substantially the same, and alleged in substance that a certain corporation known as the Virginia Coal and Iron Company, which was and is a corporation organized and existing under the laws of the State of Virginia, and which was and is a citizen of Virginia, had for a long time prior to the institution of the said action been claiming the said land as its own, and that shortly prior to the institution of the said action said Virginia Coal and Iron Company had, for the purpose and with the view of prosecuting said action in the Federal courts, and of conferring upon the Federal courts apparent jurisdiction of the said action, caused the said Lehigh Mining and Manufacturing Company to be organized in the State of Pennsylvania, and had for the purpose aforesaid fraudulently conveyed the said land to the said Lehigh Mining and Manufacturing Company, and that the said Virginia Coal and Iron Company was the real and substantial plaintiff in the said action, and that the said proceedings constituted a fraud upon the said court and conferred upon it no jurisdiction, and therefore the said defendants prayed that the said action be dismissed; that on the same day your petitioner joined issue on the said plea of not guilty, as well as on each of the said two pleas in writing, and the said action was by agreement continued from time to time until May 30th, 1894, at which time said pleas to the jurisdiction were tried by the said court, his Honor, Judge John Paul, district judge for the Western District of Virginia, sitting as the judge of the said Circuit Court, a jury having been waived by the parties, upon an agreed statement of facts reduced to writing and filed in the said cause, and after full argument the said court on the day last mentioned dismissed

the said action and gave judgment to the said defendants for their costs therein expended, on the ground that, in the opinion of said court, the said action did "not really and substantially involve a dispute or controversy properly within the jurisdiction of the said court, and that the plaintiff (your petitioner) had been collusively made a party to it for the purpose of making a case cognizable in a Federal court."

Thereupon on the same day your petitioner tendered the said court a bill of exceptions in the said cause which was signed and sealed and made a part of the record, which said bill of exceptions recites that the said cause came on to be heard on the said pleas to the jurisdiction, and was submitted to the court for decision upon agreed facts, which facts are fully and *ipsissimis verbis* set forth therein; and the record in the said cause as thus made up shows all the evidence introduced on the said trial, and all the questions of law made or decided in the said cause.

On the same day, to wit, May 30th, 1894, your petitioner filed in the said cause its assignment of errors and a petition praying for a writ of error to the Supreme Court of the United States, and the said Circuit Court thereupon entered an order allowing and awarding said writ of error and requiring your petitioner to execute bond in the penalty of $300, conditioned for the payment of all costs if the said judgment should be affirmed, and to abide the further order of the said court.

Shortly thereafter and before your petitioner had executed the said bond, and before it had taken any further steps to mature the said writ of error, it was informed by its attorneys of the decision of this Honorable Court in the case of Maynard *vs.* Hecht, 151 U. S., 324, and that according to this decision it was necessary in order to maintain a writ of error to have the question of jurisdiction alone certified to the Supreme Court from the court below for decision, and that without such certificate this court would dismiss your petitioner's writ of error.

Your petitioner, therefore, took no further steps to mature its said writ of error until at the regular term of the said

Circuit Court, held November 23d, 1894, by his Honor, Judge John Paul, sitting as the judge of the said court; at which time your petitioner, after giving the said defendants due notice thereof, moved the said court to enter the following order, to wit:—

"The above-entitled cause having heretofore come on for hearing upon the pleas to the jurisdiction of the court, and it appearing to the court that the plaintiff, the Lehigh Mining and Manufacturing Company, a corporation duly organized and existing under the laws of and a citizen of the State of Pennsylvania, was organized in February, 1893, by individuals who were stockholders and officers of the Virginia Coal and Iron Company, a corporation existing under the laws of and a citizen of the State of Virginia; and that the purpose in organizing said Lehigh Mining and Manufacturing Company was to take conveyance from the Virginia Coal and Iron Company of the lands for which this action of ejectment was brought, and to give this court jurisdiction of this action; and it appearing further that prior to the beginning of this action the Virginia Coal and Iron Company, by conveyance duly executed, conveyed to the Lehigh Mining and Manufacturing Company all of the right, title, and interest of it, the Virginia Coal and Iron Company, in and to said lands, and that since such conveyance the Virginia Coal and Iron Company has had no interest in said lands, and has not, and never has had, any interest in this suit, and owns none of the stock of said Lehigh Mining and Manufacturing Company, and has no interest therein whatsoever; and the facts appearing to the court upon the pleadings and admissions in writing of the parties, and the court being of opinion that this cause did not really and substantially involve a dispute or controversy between a citizen of Pennsylvania and citizens of Virginia, and that this court was without jurisdiction in the premises, thereupon passed an order dismissing the declaration and awarding costs to the defendants; and the plaintiff having taken a bill of exceptions herein and filed its petition for a writ of error, accompanied with its assignment of errors; and the court having passed an order allowing the said writ of

error to the Supreme Court of the United States, all of which was done at the May Term, 1894, of this court; and the court having omitted at that term to certify the question of jurisdiction to the Supreme Court; and the plaintiff having this day moved the court, after proper notice served on defendants, that it certify to said Supreme Court the said question of jurisdiction, pursuant to the fifth section of the Judiciary Act of March the 3d, 1891, it is accordingly ordered that the foregoing facts be and they are hereby certified to said Supreme Court of the United States for its opinion upon the question whether upon the facts herein recited the said conveyance to the plaintiff was collusive and fraudulent, so that this action of ejectment could not be maintained by the said plaintiff, a citizen of Pennsylvania, against said defendants, citizens of Virginia, in the Circuit Court of the United States for the Western District of Virginia, of which said defendants are residents."

But said court refused to grant said motion, and on the day last aforesaid entered an order overruling the same on the ground that the orders theretofore entered in the said cause presented fully and substantially the question of jurisdiction to be considered by the Supreme Court on the appeal theretofore allowed, and on the further ground that in the opinion of the court, if the said orders did not properly present the said question, then said court had no power to, at that time, enter an order in the said cause, for the reason that the parties had been theretofore, to wit, at the May Term, 1894, dismissed from the said court.

Your petitioner states that the proceedings aforesaid will more fully appear by reference to the record of the said suit, a certified transcript of which is filed herewith as a part hereof, marked "Exhibit A."

Your petitioner further states that it is advised and charges that the said Circuit Court committed manifest error in dismissing the said action as aforesaid, and yet your petitioner is without remedy unless this Honorable Court will grant the writ of *mandamus* hereinafter prayed for.

Wherefore your petitioner prays that a writ of *mandamus* requiring the said Circuit Court of the United States for the Western District of Virginia, and his Honor, John Paul, district judge of the United States for the Western District of Virginia, and holding the Circuit Court of the United States for said district, to show cause why the said court and the said John Paul, judge as aforesaid, should not be required to certify to this Honorable Court the aforesaid question of jurisdiction, and to enter the order which your petitioner on November 23d, 1894, moved the said court to enter as hereinbefore set forth; and for such other, further, and general relief as the nature of the case may require. And your petitioner will ever pray.

R. A. AYERS,
A. L. PRIDEMORE,
E. M. FULTON,
R. C. DALE,
J. L. WHITE,
J. F. BULLITT, JR.,
Attorneys for Petitioners.

STATE OF VIRGINIA, }
COUNTY OF WISE, } *to wit.*

I, W. A. McDowell, a notary public in and for the State and county aforesaid, do hereby certify that J. K. Taggart this day appeared before me in my county aforesaid and made oath that he is the agent of the Lehigh Mining and Manufacturing Company, and that the statements in the foregoing petition are true.

Given under my hand and official seal this tenth day of January, 1895.

W. A. MCDOWELL,
[SEAL] *Notary Public, Wise County, Virginia.*

To his Honor, Judge John Paul, district judge of the United States for the Western District of Virginia, and holding the Circuit Court of the United States for said district:—

You are hereby notified that the undersigned will, on the twenty-eighth day of January, 1895, move the Supreme Court

of the United States, at Washington, for leave to file a petition, of which the foregoing is a copy.

LEHIGH MINING AND MANUFACTURING COMPANY,
By

R. A. AYERS,
R. C. DALE,
J. F. BULLITT, JR.,
Attorneys.

I, John Paul, district judge of the United States for the Western District of Virginia, and holding the Circuit Court of the United States for said district, hereby accept service of the foregoing notice, ~~and do hereby consent that the foregoing petition may stand and be used in place of the alternative writ of *mandamus*.~~

JOHN PAUL,
District Judge.

JANUARY 14th, 1895.

EXHIBIT FILED WITH PETITION.

TRANSCRIPT OF RECORD.

FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF VIRGINIA.

The Lehigh Mining and Manufacturing Company, a corporation, Plaintiff in Error,

vs.

J. J. Kelly, Jr., and others, Defendants in Error.

No. .

THE UNITED STATES OF AMERICA, WESTERN DISTRICT OF VIRGINIA, *to wit:*—

At a Circuit Court of the United States for the Western District of Virginia, continued and held at the court house, in the town of Abingdon, Va., on the thirteenth day of December, A. D., 1894.

Present—The Honorable John Paul, judge of the Western District of Virginia.

Among others were the following proceedings, to wit:—

The Lehigh Mining and Manufacturing Company, a corporation organized and existing under the laws of the State of Pennsylvania, Plaintiff,

vs.

J. J. Kelly, James C. Hubbard, Leroy Day, Mary C. Johnson, Benjamin Williams, John Williams, Peter Gilly, James Lewis, Benjamin Mitchell, Alfred Witt, Daniel Short, Charles S. Hale, L. H. Vaughn and S. D. Ferguson, Defendants.

In Ejectment.

DECLARATION IN EJECTMENT.

Filed April 2d. Rules, 1893.

CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF VIRGINIA.

The Lehigh Mining and Manufacturing Company, a corporation organized and existing under the laws of the State of Pennsylvania, and a citizen and resident of the said State of Pennsylvania, complains of J. J. Kelly, Jr., James C. Hubbard, Leroy Day, Mary C. Johnson, Benjamin Williams, John Williams, Peter Gilly, James Lewis, Benjamin Mitchell, Alfred Witt, Daniel Short, Charles S. Hale, and L. H. Vaughn and S. D. Ferguson, the last two of whom are partners in trade under the firm name and style of L. H. Vaughn & Co., all of whom are residents and citizens of the State of Virginia, and all of whom reside in said Western District of Virginia, of a plea of trespass, for this, to wit: That heretofore, to wit, on the fourth day of April, 1893, said plaintiff was possessed of and for an estate in fee simple absolute of a certain tract or parcel of land lying and being on Powell's River and the waters thereof, in the county of Wise, State of Virginia, and within the jurisdiction of the said court, and bounded as follows, to wit:—

Beginning at a large spruce pine in the south bank of Powell's River three hundred and sixty feet east of Kelly Cave Branch; thence north five degrees east crossing Powell's River and Bear Pen Branch at four hundred and twenty-nine feet to a stake; thence north seventy degrees forty-seven minutes east, almost parallel with Bear Pen Branch, two thousand five hundred and eighty-three feet to two chestnuts and water oak by a path near the head of Bear Pen Branch; thence north ten degrees west six thousand four hundred and forty-six feet to a spruce pine, chestnut, small sourwood, and locust on the west side of a ridge; thence north forty-four degrees west, crossing two branches, two thousand three hundred and ten feet to a stake; thence north twenty degrees west six hundred and forty-six feet to a stake on bank of Roaring Fork; thence north six degrees east, crossing a branch, one thousand and

seventy-four feet to a stake above the house now occupied by James Hash; thence south forty-five degrees seven minutes west, crossing Cane Patch Fork and Roaring Fork, one thousand and five feet to a stake on the south bank of Roaring Fork; thence north fifty-eight degrees forty-two minutes west two thousand seven hundred and forty-eight feet to a marked black oak, big hollow chestnut, and down maple on top of a ridge; thence with the top of the ridge the three following courses and distances, namely, south eighty-three degrees thirty minutes west three hundred and sixty feet to a marked white oak with chestnut pointers; south seventy-three degrees fifteen minutes west two hundred and twenty-nine feet to a marked chestnut snag with pointers; and north eighty-nine degrees thirty-five minutes west one thousand and twenty feet to two dogwoods with pointers; thence leaving the top of the ridge north sixty-two degrees east two thousand nine hundred and eighty-one feet to a stake on the south bank of Roaring Fork; thence north seventy-two degrees thirty-nine minutes west, crossing Roaring Fork at five hundred feet and at two thousand two hundred feet, and crossing McKinney Branch at three thousand seven hundred and forty-five feet and at six thousand feet, six thousand one hundred and eighty-one feet to a stake about one hundred feet above McKinney Branch; thence south eighty-three degrees west one thousand seven hundred and sixty-three feet to a chestnut near McKinney Branch; thence south sixty-three degrees sixteen minutes west four hundred and seven feet to two small birches on McKinney Branch; thence north eighty-five degrees ten minutes west, crossing Nine Mile Spur at one thousand feet, three thousand seven hundred and twenty-four feet to a poplar near a branch; thence south twenty-one degrees thirty-seven minutes west, crossing two small branches, one thousand four hundred and sixty-five feet to a chestnut and dogwood on the north side of a spur; thence south forty-six degrees east two thousand two hundred and two feet to a stake a little east of the top of Nine Mile Spur; thence south fifteen degrees west one thousand six hundred and seventy-six feet to a stake; thence north eighty-one de-

grees west, crossing Nine Mile Spur at three hundred and seventeen feet, two thousand four hundred and forty-seven feet to a stake; thence south eleven degrees east one thousand nine hundred and eighty feet to a chestnut oak; thence north seventy-six degrees east seven hundred and ninety-one feet to a stake in a branch; thence south thirty-nine degrees twenty-three minutes east six thousand and forty-four feet to a white oak and chestnut on top of a spur; thence south eight hundred and twenty-five feet to a stake; thence south fifty degrees east one thousand and twenty-three feet to a stake; thence north eighty degrees ten minutes east, crossing a small branch at two hundred and ten feet, one thousand three hundred and ninety-eight feet to a stake; thence south twenty-two degrees west one thousand three hundred and fifty-nine feet to a stake; thence south eighty degrees east one hundred and sixty-five feet to a stake; thence south twenty-four degrees east, crossing the Louisville and Nashville Railroad and Powell's River, seven hundred and twenty-six feet to poplar and spruce pine stumps on south bank of Powell's River; thence north eighty-one degrees twenty minutes east nine hundred and twenty feet to a large maple on the east side of a ridge; thence south sixteen degrees east one thousand four hundred and eighty-three feet to a hickory stump, with oak pointers, on top of a ridge; thence north eighty-six degrees four minutes east, crossing Powell's River four times, as follows, namely, at six hundred and five feet, and at one thousand three hundred and five feet, and at four thousand two hundred and fifty-five feet, and at four thousand six hundred and fifty-five feet, and crossing the Louisville and Nashville Railroad at three thousand nine hundred and twenty feet, and at five thousand and eighty-five feet, and at six thousand seven hundred and fifty feet, and crossing Kelly Cave Branch at six thousand nine hundred and ninety-five feet, seven thousand three hundred and fifty-five feet to the place of beginning. Containing four thousand one hundred and fifty-seven acres, more or less. And the said plaintiff says that it, being so possessed of said tract or parcel of land, the said defendants afterwards, to wit, on the fifth day

April, 1893, entered into the same, and that they unlawfully withhold from the said plaintiff the possession thereof to the damage of the said plaintiff $10,000, and thereupon it brings its suit.

R. A. AYERS,
BULLITT & McDOWELL,
Attorneys for Plaintiff.

To J. J. Kelly, Jr., James C. Hubbard, Leroy Day, Mary C. Johnson, Benjamin Williams, John Williams, Peter Gilly, James Lewis, Benjamin Mitchell, Alfred Witt, Daniel Short, Charles S. Hale, and L. H. Vaughn and L. D. Ferguson, partners in trade under the firm name and style of L. H. Vaughn & Co.

You are hereby notified that the foregoing declaration in ejectment against you will be filed in the clerk's office of the Circuit Court of the United States for the Western District of Virginia, at Abington, Va., at rules to be holden for said court on the seventeenth day of April, 1893.

THE LEHIGH MINING AND MANUFACTURING COMPANY,
By
R. A. AYERS,
BULLITT & McDOWELL,
Attorneys for said Company.

Endorsed:—Executed the within declaration and notice on James C. Hubbard, Leroy Day, Mary C. Johnson, Benjamin Williams, John Williams, Peter Gilly, James Lewis, Benjamin Mitchell, Alfred Witt, Daniel Short, and Charles Hale, on the eighth day of April, 1893, and on J. J. Kelly, Jr., on the eleventh day of April, 1893, by delivering to them and each of them a true copy thereof in Wise County, Virginia.

JOHN G. WATTS,
U. S. Marshal for the Western District of Virginia
By
W. B. RENFRO,
Deputy Marshal.

1893, 2 April. Rules.

Dec. filed and C. O. as to J. J. Kelly, Jr., James C. Hubbard, Leroy Day, Mary C. Johnson, Benjamin Williams, John

Williams, Peter Gilly, James Lewis, Benjamin Mitchell, Alfred Witt, Daniel Short, Charles S. Hale.

1893, 1 May. Rules.

C. O. C. as to same defendants.

Executed this thirteenth day of April, 1893, by delivering a copy of the within to S. D. Ferguson, at his office in the city of Roanoke, Va., also a true copy of the within to L. H. Vaughn, at his home in the city of Roanoke, all in the Western District of Virginia.

JOHN G. WATTS,
Marshal Western District of Virginia.
By
J. W. MILLS,
Deputy Marshal.

1893, 2 April. R.

Dec. filed and C. O. as to S. D. Ferguson, L. H. Vaughn.

1893, 1 May. R.

C. O. C. as to same defendants.

ORDER FILING PLEAS, &c.

Filed May 3d, 1893.

At a regular term of the Circuit Court of the United States, continued and held for the Western District of Virginia, in the Fourth Circuit, at Abingdon, on Saturday, the thirteenth day of May, A. D. 1893.

Present—Hon. John Paul, District Judge, presiding.

The Lehigh Mining and Manufacturing Company

vs.

J. J. Kelly, Jr., James C. Hubbard, Leroy Day, Mary C. Johnson, Benjamin Williams, John Williams, Peter Gilly, James Lewis, Benjamin Mitchell, Alfred Witt, Daniel Short, Charles Hale, and L. H. Vaughn and S. D. Ferguson, the last two of whom are partners in trade under the firm name and style of L. H. Vaughn & Co.

This day came the defendants herein by counsel and moved that the plaintiff be required to give security for costs,

whereupon the court required the plaintiff to give bond in the sum of $200, conditioned according to law, and gave the plaintiff sixty days within which to execute said bond; and the defendants then filed two pleas in writing, upon which the plaintiff took issue, and the defendants further say that they are not guilty of the said trespass above laid to their charge, or any part thereof in manner and form as the said plaintiff hath above thereof complained, and of this the said defendants put themselves upon the country, and the plaintiff doth the like; and upon motion of plaintiff, J. P. Wolfe and H. F. Fox are hereby appointed surveyors herein, and both or either of them are hereby authorized and directed to go upon the land in controversy on the twenty-ninth day of May, 1893, if fair, and if not, then on the next fair day, and survey and lay out the same as either or any party hereto may direct, and return ten fair plats and three reports thereof to the court, and the marshal of this court will, if requested, attend said survey and remove force, if any shall be offered. And this cause is continued.

J. J. Kelly, Jr., et al.

ads.

Lehigh Mining and Manufacturing Company.

PLEA NO. 1.

Filed May 13th, 1893.

J. J. Kelly, Jr., et al.

ads.

Lehigh Mining and Manufacturing Company.

No. 1.

And for plea in this behalf said defendants say that the Virginia Coal and Iron Company is a corporation organized and existing under the laws of Virginia; that as such it has been for the last ten years claiming title to the lands of the

defendant J. J. Kelly, Jr., described in the declaration in this case, and said defendants say that for the purpose of fraudulently imposing on the jurisdiction of this court said Virginia Coal and Iron Company has, during the year 1893, attempted to organize, form, and create under the laws of the State of Pennsylvania a corporation out of its (the Virginia Coal and Iron Company's) own members, stockholders, and officers, to whom it has fraudulently and collusively conveyed the land in the declaration mentioned, for the purpose of enabling this plaintiff to institute this suit in this United States Court, and said defendants say that said Lehigh Mining and Manufacturing Company is simply another name for the Virginia Coal and Iron Company, composed of the same parties and organized alone for the purpose of giving jurisdiction of this case on this court. Wherefore defendants say that this suit is in fraud of the jurisdiction of this court, and should be abated. And this they are ready to verify, &c.

BLAIR, DUNCAN, &c.,
Attorneys for Defendants.

This day, J. J. Kelly, Jr., personally appeared before me, I. C. Fowler, clerk of the United States Circuit Court for the Western District of Virginia, and made oath that the foregoing plea is true to the best of his knowledge, information, and belief. Given under my hand this twelfth day of May, 1893.

I. C. FOWLER,
Clerk.

PLEA NO. 2.

Filed May 13th, 1893.

J. J Kelly, Jr., et al. ads. *The Lehigh Mining and Manufacturing Company.*	In Ejectment.

And for further plea in this behalf the said defendants come and say that said plaintiff should not further have or maintain said suit against them, because they say there was no

such legally-organized corporation as the plaintiff company at the date of the institution of this suit, and they say that the real and substituted plaintiff in this suit is the Virginia Coal and Iron Company, which is a corporation organized and existing under the laws of Virginia, and a citizen of Virginia.

And said defendants further say that said Virginia Coal and Iron Company, for the purpose and with the view of instituting and prosecuting this suit in the United States Court, and of conferring an apparent jurisdiction on said court, did by pre-arrangement, fraud, and collusion attempt to organize said Lehigh Mining and Manufacturing Company as a corporation of a foreign State, to take and hold the land in the declaration mentioned, for the purpose of giving this court jurisdiction of said suit. Wherefore defendants say that the said plaintiff has wrongfully and fraudulently imposed itself on the jurisdiction of this court, has abused its process, and wrongfully impleaded these defendants in this court.

Wherefore they pray judgment, &c., that this suit be abated and dismissed as brought in fraud of this court's jurisdiction.

And this they are ready to verify, &c.

BLAIR, DUNCAN, &c.,
For Defendants.

This day personally appeared before me I. C. Fowler, clerk of the United States Circuit Court for the Western District of Virginia, and made oath that the facts stated in the above plea are true to the best of his knowledge, information, and belief.

Given under my hand this twelfth day of May, 1893.

I. C. FOWLER,
Clerk.

At a regular term of the Circuit Court of the United States, continued and held at Abingdon, for the Western District of Virginia, in the Fourth Circuit, on Friday, the twentieth day of October, 1893.

Hon Nathan Goff, Circuit Judge, and Hon. John Paul, District Judge, presiding.

Order filed October 20th, 1893.

ORDER TO SUBMIT TO COURT.

The Lehigh Mining and Manufacturing Company

vs.

J. J. Kelly.

In Ejectment.

This day came the parties by their attorneys, and by consent it is agreed that the matter of the jurisdiction of this court, raised by said defendants' pleas, be submitted to the court upon affidavits and briefs of both plaintiff and defendant, to be filed within sixty days from this date, and copies of said affidavits to be given to each parties and copies of briefs to be furnished to counsel on each side.

Enter this in common-law order book.

N. GOFF.

OCTOBER 20th, 1893.

ORDER OF JUDGMENT OF COURT.

Filed May 30th, 1894.

At a regular term of the Circuit Court of the United States, continued and held for the Western District of Virginia in the Fourth Circuit, at Abingdon, on Wednesday, the thirtieth day of May, A. D. 1894.

Present—Hon. John Paul, District Judge, presiding.

Lehigh Mining and Manufacturing Company

vs.

J. J. Kelly, Jr., et al.

In Ejectment.

This day came again the parties by their attorneys, and on motion of the defendants to dismiss this suit, because instituted and prosecuted in fraud of the jurisdiction of the court, by consent of the parties the cause came on to be heard upon the two pleas in writing to the jurisdiction heretofore filed in

the case, at the proper time, and general replication thereto, and the agreed statement of facts signed by the attorneys and filed therein, the exceptions indorsed thereon; and the court having fully considered the said two pleas, the agreed statement of facts aforesaid, and the exception to a certain paragraph in the said agreed statement of facts, and argument of counsel, doth consider that the said exceptions are not well taken and overrule the same. And the court further considers that the said pleas be and they are hereby sustained. And for reasons in writing filed herewith, as part of this order, the court doth further consider that it has no jurisdiction of this case, and that the said action of ejectment be and the same is hereby dismissed for want of jurisdiction, but without prejudice to the parties to this suit.

And the court doth further consider that the defendants recover of the plaintiffs his costs about his defense expended.

MEMORANDUM: The party plaintiff feeling itself aggrieved by this order tendered its bill of exceptions thereto and prayed an appeal therefrom, which is allowed and ordered to be certified.

JOHN PAUL,
District Judge.

MAY 30th, 1894.

And the said opinion of the court and the said bill of exceptions referred to in the foregoing order, are in the words and figures following, to wit:—

OPINION.

Filed May 30th, 1894.

The Lehigh Mining and Manufacturing Company, Plaintiff,

vs.

J. J. Kelly and others, Defendants.

In Ejectment.

This is an action of ejectment brought by the plaintiff, a corporation under the laws of Pennsylvania, against J. J. Kelly, Jr., and others, citizens of the State of Virginia.

The defendants file two pleas in abatement. Said pleas are as follows:—

PLEA NO. 1.

And for plea in this behalf said defendants say that the Virginia Coal and Iron Company is a corporation organized and existing under the laws of Virginia; that as such it has been for the last ten years claiming title to the lands of the defendant J. J. Kelly, Jr., described in the declaration in this case; and said defendants say that for the purpose of fraudulently imposing on the jurisdiction of this court said Virginia Coal and Iron Company has, during the year 1893, attempted to organize, form, and create under the laws of the State of Pennsylvania a corporation out of its (the Virginia Coal and Iron Company's) own members, stockholders, and officers, to whom it has fraudulently and collusively conveyed the land in the declaration mentioned for the purpose of enabling this plaintiff to institute this suit in this United State's court. And said defendants say that said Lehigh Mining and Manufacturing Company is simply another name for the Virginia Coal and Iron Company, composed of the same parties and organized alone for the purpose of providing jurisdiction of this case on this court. Wherefore defendants say that this suit is in fraud of the jurisdiction of this court, and should be abated.

And this they are ready to verify, &c.

PLEA NO. 2.

And for further plea in this behalf the said defendants come and say that said plaintiff should not further have or maintain said suit against them, because they say there was no such legally-organized corporation as the plaintiff company at the date of the institution of this suit, and they say that the real and substantial plaintiff in this suit is the Virginia Coal and Iron Company, which is a corporation organized and existing under the laws of Virginia, and a citizen of Virginia. And said defendants further say that said Virginia Coal and Iron Company, for the purpose and with the view

of instituting and prosecuting this suit in the United States Court, and of conferring an apparent jurisdiction on said court, did by pre-arrangement, fraud, and collusion attempt to organize said Lehigh Mining and Manufacturing Company, as a corporation of a foreign State, to take and hold the land in the declaration mentioned, for the purpose of giving this court jurisdiction of said suit, whereupon defendants say that the said plaintiff has wrongfully and fraudulently imposed itself on the jurisdiction of this court, has abused its process, and wrongfully impleaded these defendants in this court. Whereupon they pray judgment, &c., that this suit be abated and dismissed as brought in fraud of this court's jurisdiction.

And this they are ready to verify, &c.

The plaintiff and the defendants have agreed to submit the questions of law arising on these pleas to the court for decision, the submission being on the following agreed statement of facts:—

AGREEMENT.

CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF VIRGINIA.

Lehigh Mining and Manufacturing Company

vs.

J. J. Kelly, Jr., and others.

It is hereby agreed between the parties to this action as follows, to wit:

1. That the land in controversy in this case was, prior to March 1st, 1893, claimed by the Virginia Coal and Iron Company, and had been claimed by said last-named company for some twelve years prior to said date.

2. That said Virginia Coal and Iron Company is a corporation organized and existing under the laws of the State of Virginia, and is a citizen of Virginia.

3. That on March 1st, 1893, said Virginia Coal and Iron Company executed and delivered a deed of bargain and sale to said Lehigh Mining and Manufacturing Company, by which it conveyed all its right, title, and interest in and to the land in controversy to said last-named company in fee simple.

4. That said Lehigh Mining and Manufacturing Company is a corporation duly organized and existing under the laws of the State of Pennsylvania; that it was organized in February, 1893, prior to said conveyance, and is, and was at the date of commencement of this action, a citizen of the State of Pennsylvania; and that it was organized by the individual stockholders and officers of the Virginia Coal and Iron Company.

5. That the purpose in organizing said Lehigh Mining and Manufacturing Company, and in making to it said conveyance, was to give to this court jurisdiction in this case, but that said conveyance passed to said Lehigh Mining and Manufacturing Company all of the right, title, and interest of said Virginia Coal and Iron Company in and to said land, and that since said conveyance said Virginia Coal and Iron Company has had no interest in said land, and has not and never has had any interest in this suit, and that it owns none of the stock of said Lehigh Mining and Manufacturing Company, and has no interest therein whatever.

6. That the two pleas in writing filed by the defendants in this cause at the May Term, 1893, of this court shall be tried by the court without a jury upon the foregoing statement of facts, but that any party may object to any of such statements on the ground of irrelevancy or incompetency.

Plaintiff filed the following exception to the foregoing agreement:—

The plaintiff, by counsel, objects and excepts to the statement in the first part of the fifth paragraph of the foregoing agreed facts, viz.: "That the purpose of organizing the Lehigh Mining and Manufacturing Company, and in making to it said conveyance, was to give to this court jurisdiction in this case," because the same is irrelevant and immaterial.

The substance of these pleas is that the plaintiff has, by collusion between itself and the said Virginia Coal and Iron Company, been made a party to this suit in order to give this court jurisdiction of this case.

This question is mainly to be determined by the fourth and fifth paragraphs of the agreement of facts, which are as follows:—

4. "That said Lehigh Mining and Manufacturing Company is a corporation duly organized and existing under the laws of the State of Pennsylvania; that it was organized in February, 1893, prior to said conveyance, and is, and was at the date of the commencement of this action, a citizen of the State of Pennsylvania, and that it was organized by the individual stockholders and officers of the Virginia Coal and Iron Company."

5. Paragraph: "That the purpose in organizing said Lehigh Mining and Manufacturing Company, and in making to it said conveyance, was to give this court jurisdiction in this case, but that said conveyance passed to said Lehigh Mining and Manufacturing Company all of the right, title, and interest of said Virginia Coal and Iron Company in and to said land, and that since said Virginia Coal and Iron Company has had no interest in said land, and has not, and never has had, any interest in this suit, and that it owns none of the stock of said Lehigh Mining and Manufacturing Company, and has no interest therein whatever."

Counsel for the defendants contend that the following admitted facts in these paragraphs show that this is a collusive suit, and a fraud on the jurisdiction of the court.

That the plaintiff company was organized a short time before the conveyance of the land in controversy was made, and before the bringing of this suit; that it was organized by the individual stockholders and officers of the Virginia Coal and Iron Company; that the purpose, and the only declared purpose, in organizing the Lehigh Mining and Manufacturing Company, and in making the deed of conveyance to it by the Virginia Coal and Iron Company, was to give the Federal

Court jurisdiction of this action, brought to try the title to the land in controversy.

Counsel for plaintiff contend that although these facts are admitted and are true, yet as the Virginia Coal and Iron Company has no interest in this suit, and owns none of the stock in the Lehigh Mining and Manufacturing Company, and has no interest therein, and although it conveyed the land to the plaintiff to enable it to maintain an action in this court, motives are immaterial and cannot be inquired into. They cite :—

1 Peters, 620;
18 Howard, 76;
6 Wallace, 280;
7 Howard, 198–215 (not examined.)

These cases in the opinion of the court do not sustain the position of counsel, and the exception filed by counsel for the plaintiff to part of the fifth paragraph, which states, "That the purpose of organizing the Lehigh Mining and Manufacturing Company, and in making to it said conveyance, was to give this court jurisdiction in this case," because the same is irrelevant and immaterial is not well taken. The motive, the object of parties in putting themselves or others in a position to invoke the jurisdiction of the Federal courts, is a subject of inquiry running through all the cases on this subject.

And since the statute of 1875, it is said: "If from any source the court is led to suspect that its jurisdiction has been imposed upon by the collusion of the parties, or in any other way, it may at once of its own motion cause the necessary inquiry to be made, either by having a proper issue joined and tried, or by some other appropriate form of proceeding, and act as justice may require for its own protection against fraud or imposition."

Hardesty *vs.* Memory, 116 U. S., 588.

To preclude the court from inquiring into the motives, objects, intentions, aims, and purposes of parties, and confine it alone to a consideration of their actions, would be to render it in many instances helpless in its investigation of frauds on its jurisdiction.

Section 5 of the statute of 1875 provides:—

"That if in any suit commenced in a Circuit Court, or removed from a State Court to a Circuit Court of the United States, it shall appear to the satisfaction of said Circuit Court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said Circuit Court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this Act, the said Circuit Court shall proceed no further therein, but shall dismiss the suit or remove it to the court from which it was removed, as justice may require, &c.

In Greenway *vs.* Tucker and others, 10th Federal Reporter, 884, it was held that "the transfer by a blank deed *mala fide*, without consideration of the title to land in one State to a citizen of another State, for the purpose of bringing suit in a Federal court, will not enable the grantee to maintain a suit in ejectment in such court."

The consideration of the deed from the Virginia Coal and Iron Company to the plaintiff is not given in the agreement of facts.

It is termed "a deed of bargain and sale." If the consideration was given the case just cited might be an authority in this case, or it might not be applicable. But noting the principle in that case, and in other cases referred to in argument, and applying it to the case at bar, we might express the court's conclusion as follows:—

The organization by the individual stockholders and officers of a corporation existing under the laws of one State of a corporation under the laws of another State, for the express purpose of bringing a suit in a Federal court to try the title to a tract of land claimed by the former corporation and conveyed to the latter after its organization and before suit brought, will not enable the grantee to maintain a suit in ejectment in such court.

This is truly a novel case. We find no precedent for the devices here employed to deprive the citizen of his right to have his title to his property litigated in the courts of his State, and to compel him to make his defense before a Federal tribunal.

The claims of the plaintiff, that the Virginia Coal and Iron Company has no interest in this suit; that it has no stock in the plaintiff company, and that by the conveyance of the tract of land in controversy it conveyed all its right, title, and interest to the plaintiff, may be technically correct, but it is to the average mind, as a matter of fact, difficult to conceive how the individual stockholders and officers of one corporation can organize another corporation for the express purpose of bringing suit to try the title to a tract of land belonging to them as individual stockholders and officers of the first corporation can have said tract of land conveyed to the second corporation, of which they are also individual stockholders and officers, and then bring suit to recover said tract of land, and yet have no interest in the suit.

The difficulty to understand this is increased where the facts show that the only tract of land held by the second corporation is that conveyed to it by the first corporation for the purpose of bringing suit to try the title to the land.

This court cannot give its sanction to such a device to invoke its jurisdiction. To approve such a scheme would be equivalent to transferring the litigation of all land titles where a Virginia corporation claims title to land against an individual citizen of Virginia, into the Federal courts.

All that would be necessary to accomplish this would be for "the individual stockholders and officers" of a Virginia corporation to organize in another State a corporation for the purpose of bringing suit in a Federal court to try the title to the tract of land in dispute, and then take a conveyance of the tract of land from the Virginia corporation to the foreign corporation.

The device might be carried still further. An individual citizen, finding himself in a controversy with his neighbor

concerning a tract of land, and desiring to have the question tried in a Federal court, could very readily organize a corporation in another State for the purpose of bringing a suit in the Federal court, then convey whatever interest he claims in the land to the foreign corporation of his own creation and in which he is the only stockholder, and the courts of the United States would be open to him to litigate in a Federal court a question that the laws of the land, State and Federal, contemplate shall be litigated in the courts of the State of [illegible]oth parties are citizens.

[illegible]urt is already of opinion that this suit does not [illegible] substantially involve a dispute or controversy properly within the jurisdiction of this court; that the plaintiff has been collusively made a party to it for the purpose of making a case cognizable in a Federal court, and this case must be dismissed.

BILL OF EXCEPTIONS.

Filed May 30th, 1894.

At a regular term of the Circuit Court of the United States, continued and held for the Western District of Virginia, in the Fourth Circuit, at Abingdon, on Wednesday, the thirtieth day of May, A. D. 1894.

Present—Hon. John Paul, District Judge, presiding.

Lehigh Mining and Manufacturing Company

vs.

J. J. Kelly and others.

Bill of Exception.

BE IT REMEMBERED, That upon the trial of the issue on the pleas numbered one and two, and on file in this cause to the jurisdiction of the court, and the motion of the defendants to dismiss the cause for want of jurisdiction, the parties plain-

tiff and defendant agreed to the facts, which are in the words and figures following:—

CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF VIRGINIA.

Lehigh Mining and Manufacturing Company

vs.

J. J. Kelly, Jr., and others.

It is hereby agreed between the parties to this action as follows, to wit:—

First.—That the land in controversy in this case was, prior to March 1st, 1893, claimed by the Virginia Coal and Iron Company, and had been claimed by said last-named company for some twelve years prior to said date.

2. That said Virginia Coal and Iron Company is a corporation organized and existing under the laws of the State of Virginia, and is a citizen of Virginia.

3. That on March 1st, 1893, said Virginia Coal and Iron Company executed and delivered a deed of bargain and sale to said Lehigh Mining and Manufacturing Company, by which it conveyed all its right, title, and interest in and to the land in controversy to said last-named company in fee simple.

4. That said Lehigh Mining and Manufacturing Company is a corporation duly organized and existing under the laws of the State of Pennsylvania; that it was organized in February, 1893, prior to said conveyance, and is and was at the date of commencement of this action a citizen of the State of Pennsylvania, and that it was organized by the individual stockholders and officers of the Virginia Coal and Iron Company.

5. That the purpose in organizing said Lehigh Mining and Manufacturing Company, and in making to it said conveyance, was to give to this court jurisdiction in this case, but that said conveyance passed to said Lehigh Mining and Manufacturing Company all of the right, title, and interest of said

Virginia Coal and Iron Company in and to said land, and that since said conveyance said Virginia Coal and Iron Company has had no interest in said land, and has not and never has had any interest in this suit, and that it owns none of the stock of said Lehigh Mining and Manufacturing Company, and has no interest therein whatsoever.

6. That the two pleas in writing filed by the defendants in this cause at the May Term, 1893, of this court, shall be tried by the court without a jury upon the foregoing statement of facts; but that any party may object to any of such statements on the ground of irrelevancy or incompetency.

WHITE & BUCHANAN,
A. L. PRIDEMORE,
J. F. BULLITT, JR.,
And others,
Attorneys for Plaintiff.

C. T. DUNCAN,
For Defendants.

The plaintiff by counsel objects and excepts to the statement in the first part of the fifth paragraph of the foregoing agreed facts, viz.: "That the purpose of organizing the Lehigh Mining and Manufacturing Company, and in making to it said conveyance, was to give to this court jurisdiction in this case," because the same is irrelevant and immaterial.

WHITE & BUCHANAN,
FULTON & PRIDEMORE, and
BULLITT,
Attorneys.

Agreed facts, filed May 18th, 1894, and submitted the questions arising on said pleas to the decision of the court, waiving a jury, and the court decides the questions at issue on said pleas in favor of the defendant, and held that the court did not have jurisdiction of this suit, and ordered the same to be dismissed, to which opinion and action of the court the plaintiff did then and there except; and forasmuch as the facts aforesaid do not appear of record, and in order that it may have the benefit of his said exception, the plaintiff prays that this

its bill of exception may be allowed, which is accordingly signed, sealed, and made a part of the record.

JOHN PAUL,
District Judge.

[SEAL]

And on the same day came again the parties, by counsel, and the plaintiff filed its petition for a writ of error and assignment of errors, which petition and assignment are in words and figures following, to wit:—

PETITION FOR WRIT OF ERROR.

Filed May 30th, 1894.

To the Honorable Judges of the Circuit Court of the United States for the Western District of Virginia:

Your petitioner, the Lehigh Mining and Manufacturing Company, would respectfully represent that it is aggrieved by the rulings of said court in the ejectment cause of the Lehigh Mining and Manufacturing Company against J. J. Kelly, Jr., and others, in which final judgment dismissing the plaintiff's declaration was rendered at the May Term, 1894, of the said court held at Abingdon, Va., and your petitioner says that in the record and proceedings in said cause there is manifest error as is fully set forth and shown in the assignments of error which accompany this petition, and to which reference is here made.

Your petitioner therefore prays that a writ of error may be allowed him to said judgment and proceedings to the Supreme Court of the United States, and that a full transcript of the record and proceedings in said cause, duly authenticated, may be sent to the Supreme Court.

THE LEHIGH MINING AND MANUFACTURING COMPANY,
By
WHITE & BUCHANAN,
R. A. AYERS,
R. C. DALE,
E. M. FULTON,
A. L. PRIDEMORE,
J. F. BULLITT, JR.,
Counsel for Petitioner.

ASSIGNMENT OF ERRORS.

Filed May 30th, 1894.

CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF VIRGINIA.

The Lehigh Mining and Manufacturing Company

vs.

J. J. Kelly, Jr., et al.

} Assignment of Errors.

The Lehigh Mining and Manufacturing Company, plaintiff in the above-named cause, by counsel, says that in the proceedings and judgment in said cause entered at the May Term of said court, 1894, there is a manifest error in this, to wit:—

The court erred in holding that it had not jurisdiction in said cause, and in holding that your petitioner is not a *bona fide* corporation, organized and existing under the laws of the State of Pennsylvania, and erred in holding that the controversy in said cause was not substantially between citizens of different States, and erred in dismissing the declaration in said cause for lack of jurisdiction.

R. A. AYERS,
R. C. DALE,
WHITE & BUCHANAN,
E. M. FULTON,
A. L. PRIDEMORE,
J. F. BULLITT, JR.,
Counsel for Plaintiff in Error.

ORDER GRANTING WRIT OF ERROR.

Filed May 30th, 1894.

At a regular term of the Circuit Court of the United States, continued and held for the Western District of Virginia, at

Adingdon, in the Fourth Circuit, on Wednesday, the thirtieth day of May, A. D. 1894.

Present—Hon. John Paul, District Judge.

Lehigh Mining and Manufacturing Company.

vs.

J. J. Kelly, Jr., et al.

In Ejectment.

The plaintiff considering itself aggrieved by the rulings of said court in the said case in which final judgment was rendered at the May Term, 1894, to wit, on May 30th, 1894, of said Circuit Court held at this place, dismissing the said case because the said court, in its opinion, did not have jurisdiction thereof, and having on the thirtieth day of May, 1894, filed its bill of exceptions, and having on this day filed its assignment of errors and its petition praying for a writ of error to said judgment and proceedings to the Supreme Court of the United States upon the said question of jurisdiction, and praying that said writ of error be allowed it to the said Supreme Court of the United States, and that a full transcript of the record and proceedings in said cause, duly authenticated, be sent to said Supreme Court.

Now on this day, to wit, May 30th, 1894, it is ordered and considered by this court that said writ of error be allowed and awarded as prayed for, and the clerk is directed to make a transcript of the record and proceedings in said case, duly authenticated, as soon as the business in his office will permit, as provided for in the petition herein. And the court doth order that said plaintiff, or some one for it, execute a bond in the penalty of $300 conditioned for the payment of all costs, if the same shall be affirmed, and abide the further order of this court, said bond to be approved by one of the judges of this court, and upon that being done no execution shall issue pending the appellate proceedings.

JOHN PAUL,
District Judge.

May 30th, 1894.

ORDER

Overruling motion to enter order of appeal—and appeal—and to perfect appeal later.

Filed November 23d, 1894.

At the regular term of the Circuit Court of the United States, in the Fourth Circuit, continued and held for the Western District of Virginia, at Abingdon, on Friday, the twenty-third day of November, A. D. 1894.

Hon. John Paul, District Judge, presiding.

Lehigh Mining and Manufacturing Company

vs.

J. J. Kelly, Jr., et al.

This day came the plaintiff herein by counsel, and moved the court to enter the following order, to wit:—

"The above-entitled cause having heretofore come on for hearing upon the pleas to the jurisdiction of the court, and it appearing to the court that the plaintiff, the Lehigh Mining and Manufacturing Company, a corporation duly organized and existing under the laws of and a citizen of the State of Pennsylvania, was organized in February, 1893, by individuals who were stockholders and officers of the Virginia Coal and Iron Company, a corporation existing under the laws of and a citizen of the State of Virginia, and that the purpose in organizing said Lehigh Mining and Manufacturing Company was to take conveyance from the Virginia Coal and Iron Company of the lands for which this action of ejectment was brought, and to give give this court jurisdiction of this action, and it appearing further that prior to the beginning of this action the Virginia Coal and Iron Company, by conveyance duly executed, conveyed to the Lehigh Mining and Manufacturing Company all of the right, title, and interest of it, the Virginia Coal and Iron Company, in and to said lands, and that since said conveyance the Virginia Coal and Iron Company has had no in-

terest in said lands, and has not and never has had any interest in this suit, and owns none of the stock of said Lehigh Mining and Manufacturing Company, and has no interest therein whatever, and the facts appearing to the court upon the pleadings and admissions in writing of the parties, and the court being of opinion that this cause did not really and substantially involve a dispute or controversy between a citizen of Pennsylvania and citizens of Virginia, and that this court was without jurisdiction in the premises, thereupon passed an order dismissing the declaration and awarding costs to the defendants; and the plaintiff having taken a bill of exceptions herein and filed its petition for a writ of error, accompanied with its assignment of errors, and the court having passed an order allowing the said writ of error to the Supreme Court of the United States, all of which was done at the May Term, 1894, of this court; and the court having omitted at that term to certify the question of jurisdiction to the Supreme Court, and the plaintiff having this day moved the court, after proper notice served on defendants, that it certify to said Supreme Court the said question of jurisdiction, pursuant to the fifth section of the Judiciary Act of March the 3d, 1891, it is accordingly ordered that the foregoing facts be and they are hereby certified to said Supreme Court of the United States for its opinion upon the question whether upon the facts herein recited the said conveyance to the plaintiff was collusive and fraudulent, so that this action of ejectment could not be maintained by the said plaintiff, a citizen of Pennsylvania, against said defendants, citizens of Virginia, in the Circuit Court of the United States for the Western District of Virginia, of which said defendants are residents."

To which motion defendants by counsel objected, and after full argument and consideration of the question presented, the court being of opinion that the orders hereinbefore entered in the cause present fully and succinctly the question of jurisdiction to be considered by the Supreme Court on the appeal heretofore allowed, and being further of the opinion that whether the said orders do or not properly present the said question, this court now has no power to enter an order

in this cause, for the reason that the parties were heretofore, to wit, at the May Term, 1894, of this court, dismissed herefrom.

It is therefore considered by the court that the motion of said plaintiff be and the same is hereby overruled and denied.

And the plaintiff, signifying its desire to appeal from the action of the court in the premises, it is ordered that the said motion be continued until the adjourned term of this court, to be held in December next, for the purpose of enabling said plaintiff to perfect its appeal.

ORDER

continued to adjourned term, January 23d, 1895, to perfect appeal.

Filed December 13th, 1894.

At an adjourned term of the Circuit Court of the United States continued and held for the Western District of Virginia, in the Fourth Circuit, at Abingdon, on Thursday, the thirteenth day of December, 1894.

Hon. John Paul, District Judge, presiding.

Lehigh Mining and Manufacturing Company vs. *J. J. Kelly, Jr., and others.*	Ejectment.

On motion of the plaintiff, the order entered on the 23d November, 1894, in this cause, extending the time within which the plaintiff might perfect its appeal to this adjourned term of this court. Now for reasons appearing to the court it is ordered that the said motion be continued to an adjourned term of this court to be held on the twenty-third day of January, 1895, within which to perfect said appeal.

CLERK'S CERTIFICATE.

UNITED STATES OF AMERICA,
WESTERN DISTRICT OF VIRGINIA,
IN THE FOURTH CIRCUIT, AT ABINGTON, VA.

I, I. C. Fowler, clerk of the Circuit Court of the United States for the Western District of Virginia, in the Fourth Circuit, at Abingdon, Va., do hereby certify that the foregoing is a full and true transcript of the record and proceedings in this court in the above case of the Lehigh Mining and Manufacturing Co. *vs.* J. J. Kelly, Jr., James C. Hubbard, Leroy Day, Mary C. Johnson, Benjamin Williams, John Williams, Peter Gilly, James Lewis, Benjamin Mitchell, Alfred Witt, Daniel Short, Charles S. Hale, L. H. Vaughn, and S. D. Ferguson.

Witness my hand and seal of the said Circuit Court of the United States, at Abingdon, Va., this twenty-sixth day of December, A. D. 1894.

I. C. FOWLER,
Clerk.

[SEAL]

Supreme Court of the Unite

Lehigh Mining and Manufacturing Co

vs.

John Paul, District Judge of the United States for the Western District of Virginia, and holding the Circuit Court of the United States for the said District.

BRIEF FOR PETITIONER ON MOTION AND PETITION FOR MANDAMUS.

J. F. BULLITT, Jr.,
Of Counsel for Petitioner.

R. A. AYERS,
R. C. DALE,
A. L. PRIDEMORE,
E. M. FULTON,
J. G. WHITE,
J. F. BULLITT, Jr.,
Counsel for Petitioner.

Allen, Lane & Scott, Prs., Phila.

Supreme Court of the United States

SUPREME COURT OF THE UNITED STATES.

Lehigh Mining and Manufacturing Company

vs.

John Paul, District Judge of the United States for the Western District of Virginia, and holding the Circuit Court of the United States for the said District.

BRIEF FOR PETITIONER ON MOTION AND PETITION FOR *MANDAMUS.*

The facts in the case, briefly stated, are as follows: In April, 1893, the Lehigh Mining and Manufacturing Company, a citizen of Pennsylvania, instituted an action of ejectment in the Circuit Court of the United States for the Western District of Virginia, at Abingdon, against J. J. Kelly, Jr., and others, citizens of Virginia, for the recovery of a boundary of land containing about three thousand acres lying in Wise County, Virginia, and for damages for the detention thereof.

The defendants filed pleas to the jurisdiction alleging that the Virginia Coal and Iron Company, a citizen of Virginia, was the real plaintiff, and that it had shortly before the institution of the suit made a transfer to the plaintiff, for the purpose of giving jurisdiction to the Federal Court. Issue was joined on these pleas, and at the May Term, 1894, the case was tried by the court without a jury on this issue upon an agreed statement of facts. This statement of facts admitted that the purpose of the transfer was to give jurisdiction to the Federal Court, but also admitted that the *transfer was absolute*, and that the Virginia Coal and Iron Company had no interest in the Lehigh Mining and Manufacturing Company, no interest in said land, and no interest whatever in the result of said suit.

The court, however, Judge Paul presiding, dismissed the case for want of jurisdiction. This was done at the May Term, 1894. The plaintiff forthwith tendered a bill of exceptions which set forth all the facts, and this was signed and sealed and made a part of the record; but plaintiff failed to request the court until after the expiration of the trial term to certify to this court the question of jurisdiction pursuant to the Judiciary Act of March 3d, 1891. At the next term of the court, to wit, in November, 1894, the plaintiff moved the court to grant such certificate, but the court refused to do so, being of the opinion that it was unnecessary, notwithstanding the decision in *Maynard* vs. *Hetcht, 151 U. S., 322,* and being also of opinion that such a certificate could not be made except during the trial term.

These being the facts, does *mandamus* lie to compel the granting of the said certificate? If the court erred in refusing to grant the certificate, then there can be no doubt that *mandamus* is the proper remedy. The duty is ministerial and peremptory—as clearly so as the signing of a bill of exceptions. It has been frequently held that *mandamus* would lie to compel the signing of a bill of exceptions. *See High on Extraordinary Legal Remedies, 2d Edition, section 24 and sections 199 to 215, and cases cited; Desty's Federal Procedure, 7th Edition, section 688 and notes;* Ex parte *Crane, 5 Peters, 190.*

So, also, it is clear that the petitioner has no other adequate remedy. In such a case as this the certificate from the court below is a prerequisite to the writ of error.

See Maynard vs. *Hetcht, 151 U. S., 324.*

If, then, we can show that the petitioner has a "clear legal right" to have the question of jurisdiction certified, the writ asked for will be granted. *See High on Extraordinary Legal Remedies, 2d Edition, section 10.* The whole question, therefore, is, must such a certificate be signed during the trial term, or can it be signed at any time before the expiration of the time given for appeal or writ or error? We will first give the affirmative reasons for the contention that it can be signed at any time before the expiration of the time for a writ of error

or appeal, and will then consider the arguments of the defendants' counsel in support of the contention that it can be signed only during the trial term.

1. The Act in question does not say *when* the certificate shall be made.

The provision is as follows: "That appeals or writs of error may be taken from the district court or from the existing circuit courts direct to the Supreme Court in the following cases: In any case in which the jurisdiction of the court is in issue. In such cases the question of jurisdiction alone shall be certified to the Supreme Court from the court below for a decision." *See Act of March 3d, 1891, section 5, U. S. Statutes 1890–91, page 827.* As the Act is silent on the subject of the time at which the certificate shall be made, the inference is that it was intended that it might be made at any time before the expiration of the time for writ of error or appeal. And this inference is strengthened by reference to former Acts on a kindred subject, namely, concerning certificates on division of opinion. Section 652 of the Revised Statutes provides:—

"When a final judgment or decree is entered in any civil suit or proceeding before any circuit court held by a circuit justice and a circuit judge or a district judge, or by a circuit judge and a district judge, in the trial or hearing whereof any question has occurred upon which the opinions of the judges were opposed, the point upon which they so disagreed shall, *during the same term*, be stated under the direction of the judges, and certified, and such certificate shall be entered of record."

To the same effect is *section 651 of Revised Statutes* concerning certificates on division of opinion in criminal cases. As Congress was so careful to provide in these statutes concerning division of opinion that the certificate should be made *during the same term*, and as in the present Act it says nothing about the time at which the certificate should be made, the inference is that it did not intend that it should be made "during the same term." Moreover, there was a very good

reason for requiring a certificate under the former Acts to be made at the same term, while there is none, so far as we can see, for requiring it under the present Act. There was no other way of getting into the record the fact of the division of opinion except by means of the certificate. It could not be done by a bill of exceptions. In so far as it was intended to *put facts into the record* a certificate of division was exactly like a bill of exceptions, and the reasons for requiring the bill of exceptions to be signed during the trial term applied with equal force to it, the certificate of division. Moreover, it is seldom that the same judges hold two successive terms of the Circuit Court. As the fact of division lay wholly within the breasts of the judges trying the cause, of course it would be out of the question for another judge sitting at a subsequent term to attempt to make up and sign a certificate of division. But under the present Act all questions arising upon the trial of a question of jurisdiction can be gotten into the record by a bill of exceptions, and therefore there is no reason why a judge sitting at a subsequent term cannot make and sign the certificate as well as the judge which tried the case. Hence it is that the provision requiring the certificate to be made during the term was left out of the present Act.

2. The language of the Act of March 3d, 1891, when carefully considered, shows affirmatively that it was intended that the certificate might be made at any time before the expiration of the time for appeal or writ of error.

The phrase "in such cases" refers, we think, to all that goes before in that section, and therefore means in cases in which appeals or writs of error *have been* taken. It is only in such cases, that is, where a writ of error or an appeal has been taken, that the court below has any authority to certify the question of jurisdiction to the Supreme Court. It follows, then, necessarily, that the certificate can be made at any time at which an appeal or writ of error is taken. Moreover, we do not well see how this certificate can be made until there has been filed an assignment of errors and petition for a

writ of error, because the judge would not know of what particular error the party really complained until the assignment of errors had been filed, and the court might thus be required to do a deal of useless labor, and might at last miss the real point in issue. Now we take it that a party has no right to file an assignment of errors and petition for a writ of error until the case has progressed to the point where he is entitled to a writ of error, and this can only be after final judgment. Now suppose a case of this sort: A. sues B., and B. files a plea to the jurisdiction and also pleads to the merits. A. takes issue on both pleas, but insists that the plea to the jurisdiction be first tried. This he has the right to do in Virginia, under *section 3264 of the Code of 1887*, which provides:—

"The defendant in any action may plead as many several matters, whether of law or fact, as he shall think necessary, and he may file pleas in bar at the same time with pleas in abatement, or within a reasonable time thereafter, but the issue on the pleas in abatement shall be first tried."

The trial upon the plea to the jurisdiction is proceeded with before a jury, and the defendant takes a number of bills of exceptions to evidence and to the instructions of the court, and the question of jurisdiction is found against the defendant. The cause is then continued upon the merits and tried at the next term, and a verdict and judgment again rendered against the defendant. Now in such a case as this, if the defendants at bar be correct, the defendant in the case supposed could not by any procedure known to us bring the question of jurisdiction directly to this court, because he had no right to a writ of error until after the rendition of final judgment, and therefore could not have filed his assignment of errors and petition for a writ of error at the previous term. If we be right in contending, then, that the court has no authority to grant the certificate under the present statute until after the filing of the assignment of errors, it follows necessarily that the certificate does not have to be signed during the trial term.

3. Necessary deductions from the decision of the Supreme Court in the case of United States *vs.* Jahn, decided November 5th, 1894 (*see advance sheets of the Supreme Court Reports*), show that the certificate can be signed after the trial term.

In this case the court said:—

"If the question of jurisdiction is in issue, and the jurisdiction sustained, and judgment on the merits is rendered in favor of the plaintiff, then the defendant can elect either to have the question certified and come directly to this court, or to carry the whole case to the Circuit Court of Appeals, and the question of jurisdiction can be certified by that court."

The defendant, then, in such a case has two methods of getting the question of jurisdiction before the Supreme Court. Now suppose he adopts the method of going first to the Circuit Court of Appeals. The latter court may then certify the question of jurisdiction to the Supreme Court. But from what does it make its certificate? Clearly, from the transcript of the record returned to it. This may be six months or a year or more after the trial term in the court below. If the Circuit Court of Appeals can make such a certificate after the trial term, what reason is there for saying that the court below cannot do the same thing? It seems to us that this argument is conclusive of the question.

4. The doctrine of *nunc pro tunc* orders applies to this case.

Whether the certificate should be in the shape of an order of court, or whether it was intended that it should only be necessary for the judge to sign the certificate, does not appear from the statute. The language is, "shall be certified to the Supreme Court from the court below for decision." But assuming that an order of court was necessary, it should have been entered at the next term *nunc pro tunc*. The plaintiff filed its petition for a writ of error and assignment of errors at the May Term of court, and the court thereupon at that term entered an order awarding the writ of error. It thereupon became the duty of the court to certify the question of jurisdiction to the Supreme Court. The omission to do so was an omission of the court and not of the parties, and the court

will never allow a party to suffer by reason of its own delay. *See Black on Judgments, section 127; Richardson* vs. *Green, 130 U. S., 104; 12 American & English Encyl., pages 80, 81, and 82, and cases cited.*

We will now consider the arguments urged by the defendants' counsel:—

A. They contend that the certificate under the Act of March 3d, 1891, is the same as a bill of exceptions, and that for this reason it must be signed during the trial term. Nearly the whole argument of counsel for defendants in the court below was directed to showing that a bill of exceptions could not be signed after the trial term. We admit that this is true, except under extraordinary circumstances, and we do not contend that any such circumstances exist in this case. If, therefore, the defendant is right in asserting that the certificate is nothing more nor less than a bill of exceptions, we admit that our petition should be dismissed; but we think it clear that the certificate is not the same as a bill of exceptions, and was not intended to take the place thereof.

First.—The burden of proof is on the defendant to show that the certificate was intended to take the place of a bill of exceptions. The Act does not either expressly or by implication so provide. If the Congress had intended to change the time-honored method of *getting facts into* the record, we think it would have done so in express language, and that it did not, is conclusive proof that it did not so intend.

Second.—The case of United States *vs.* Jahn, above referred to, shows that the Circuit Court of Appeals has the right under certain circumstances to certify a question of jurisdiction to the Supreme Court. There is no provision in the Act for the court below certifying the question of jurisdiction to the Circuit Court of Appeals. Therefore, it must have been intended that the Circuit Court of Appeals should make its certificate without reference to any certificate from the court below, that is, from the record as made up by bills of exceptions.

Third.—The certificate is required in chancery causes as well as in causes at law. The functions of a certificate are therefore very different from a bill of exceptions.

Fourth.—Section 700 of the Revised Statute provides :—

" When an issue of fact in any civil cause in a circuit court is tried and determined by the court without the intervention of a jury, according to section 649, the rulings of the court in the progress of the trial of the cause, if excepted to at the time, *and duly presented by a bill of exceptions*, may be reviewed by the Supreme Court upon a writ of error or upon appeal ; and when the finding is special the review may extend to the determination of the sufficiency of the facts found to support the judgment."

This covers the case at bar, and we take it that it is clear that the Evart's Act did not repeal this section, and therefore clear that we could not maintain a writ of error from this court without a bill of exceptions.

B. Defendants' counsel contend that the certificate could not be granted after the trial term, because the parties were then finally dismissed, and that after such dismissal the court has no right to enter an order affecting their rights.

We admit that this is true as to all orders affecting the *original rights* of the parties, but it is not true as to any orders which may be necessary to perfect appellate process, and the order which we seek in this case has no other purpose or function than the perfection of appellate process.

Under Rule 36 of the Supreme Court an appeal or writ of error may be allowed at any time within two years by the Circuit Court. *See Foster's Federal Practice, page 1309.* And a *supersedeas* may also be granted by the court below. If the court below can, after the trial term, award an appeal it can by necessary implication enter any order necessary to perfect the appeal.

C. The defendants in the court below relied upon the case of *McLish* vs. *Roff, 141 U. S. Reports, page 668*, to show that the certificate must be granted at the trial term. That case says :—

" When that judgment is rendered the party against whom it is rendered must elect whether he will take his writ of error or appeal to the Supreme Court upon the question of jurisdiction alone, or to the Circuit Court upon the whole case.

If the latter, then the Circuit Court of Appeals may, if it deems proper, certify the question of jurisdiction to this court."

Their contention is that the word *when*, as here used, means *at the trial term*, and that this election must not only be then made, but that everything must be done at the trial term to carry out and perfect the same. We think that the word *when*, as here used, bears no such construction, but simply means *after;* for clearly the defendant could within six months elect to take the case to the Circuit Court of Appeals. As to this there can be not a shadow of doubt. We think this case does not in any manner militate against our contention; but on the contrary, from another standpoint, it is confirmatory thereof. For if there be anything in the defendants' contention that the certificate is the same as a bill of exceptions, then it is clear that the certificate must be made up and signed at the term at which the question of jurisdiction was passed upon. In the case above supposed, where the question of jurisdiction was first tried, and then at a subsequent term the case was tried upon the merits, according to the argument of the defendants the certificate could only have been granted at the previous term. But this case of McLish *vs.* Roff shows that the defendant can wait, and, indeed, must wait until rendition of final judgment at the subsequent term before making his election, and the clear implication is that he could then not only make his election to go to the Supreme Court, but could have all orders entered necessary to take the case to that court, including an order certifying the case. This case therefore annihilates the defendants' contention that the certificate is the same as a bill of exceptions.

D. Defendants contend that the case of *United States* vs. *Pile, 130 U. S., 280*, shows that no certificate can be awarded after the trial term. Even a casual reading of this case, however, will show that it is not in point. In the first place, it was a case of division of opinion, and as we have before shown, the statute concerning division of opinion expressly requires that the certificate shall be made during the trial term. In the second place, the point there decided was

that the court at the subsequent term had no jurisdiction to enter any order concerning the matter upon which the division of opinion arose. The facts were that Pile was tried in the Circuit Court upon an indictment for forgery, found guilty, and judgment against him entered at the November Term of court, and at that time a motion was made in arrest of judgment and the motion overruled; but an order was entered suspending execution of the judgment until the following April Term. Nothing more was done in the case until the following April, at which time, on motion of the defendant, the court set aside the order overruling the motion in arrest of judgment, and then the defendant again moved in arrest of judgment, and it was upon this motion, namely, as to whether the judgment should be arrested, that the judges divided in opinion and certified this question to the Supreme Court. But the Supreme Court held that after the overruling of the motion in arrest of judgment at the November Term, and the expiration of that term without any further order in the case, that the lower court had no further jurisdiction at a subsequent term to act in the premises. The court said:—

"We do not understand that the court at that time had any further jurisdiction of the case. There was no motion continued from the last term; there was no application or proceeding from the last term, nor anything coming over from it, except the suspension of execution. This did not leave the power of the court to reconsider the whole case still open. As it was not a case, therefore, for a division of opinion, in which either the court or the circuit judge (who did not sit upon the trial) had any power to act, we consider that there is nothing before this court, and the case must be dismissed here. The certificate of division related to a matter in which they had no right to act or to make such a certificate. It therefore brings nothing before this court for review; and *the case is dismissed* for want of jurisdiction."

In other words, the decision in this case is only to the effect that after a final judgment and the expiration of the term at which it was entered, the court below has no jurisdiction to enter any order affecting the original rights of the parties, and

it does not in any manner contradict our proposition that the trial court below may, nevertheless, after the trial term, enter any order necessary to perfect appellate proceedings.

Respectfully submitted,

J. F. BULLITT, JR.,
Of Counsel for Petitioner.

R. A. AYERS,
R. C. DALE,
A. L. PRIDEMORE,
E. M. FULTON,
J. G. WHITE,
J. F. BULLITT, JR.,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES.

Lehigh Mining and Manufacturing Company
Vs.
John Paul, Judge &c.

Addenda to Brief for Petitioner.

The question as to granting a writ of mandamus is always discretionary with the court, and will not be granted unless the court is satisfied that the petitioner has substantial rights which have been violated. It is therefore material to show that the court below erred in dismissing the declaration, and that when the case comes to this court upon a writ or error the judgment below will be reversed.

The agreed facts admit "that said conveyance passed to said Lehigh Mining and Manufacturing Company all of the right, title, and interest of said Virginia Coal and Iron Company in and to said land, and that since said conveyance said Virginia Coal and Iron Company has had no interest in said land, and has not and never has had any interest in this suit, and that it owns none of the stock of said Lehigh Mining and Manufacturing Company, and has no interest therein whatsoever."

Such being the facts, it seems clear that the Circuit Court had jurisdiction. The whole question is, was the transfer real: was the conveyance absolute? The motive therefor is immaterial, and will not be inquired into. Desty's Federal Proceedure (7 Ed.) p. 146; Barney vs. Baltimore, 6 Wall., 280; McDonald v. Smalley, 1 Peters 620; Smith vs. Kernochen, 7 Howard 199; Hurst's Lessee vs. McNeil, 1 Wash. C. C. 70; Marion vs. Ellis, 10 Fed. Rep. 410; DeLaveaga vs. Williams, 5 Sawy. 574; Briggs vs. French, 2 Sumner, 255; Hoyt vs. Wright, 4 Fed. Rep., 168; Maxwell's Lessee vs. Levy, 2 Dall. R. 381, and 4 Dall. R. 330.

J. F. Bullitt, Jr.,
Of Counsel for Petitioner.

Supreme Court of the United States.

LEHIGH MINING AND MANUFACTURING COMPANY

v.

HON. JOHN PAUL, DISTRICT JUDGE OF THE UNITED STATES FOR THE WESTERN DISTRICT OF VIRGINIA, AND HOLDING THE CIRCUIT COURT OF THE UNITED STATES FOR SAID DISTRICT.

On a motion for a Rule Nisi to show cause why a Writ of Mandamus should not issue.

Brief of Hon. John Paul, Judge of the United States for the Western District of Virginia, and holding the Circuit Court for the United States for said District in May, 1894.

It is submitted that the motion is not in any cause pending in this honorable court, but is an application for a writ formerly designated as a prerogative writ, and is now known as, and is, an original writ and proceeding by mandamus. (See Drexel *v.* Mann, 6 W. & S. 386; State *v.* Todd, 11 Ohio, 351.) Therefore, being improperly entled, is erroneous, and should not be allowed to be filed.

(Roddy *v.* Tiogo Common Pleas, 1 Wend. 291; Powell on Appellate Proceedings, page 251, section 54; and 2 Johns, 372.) I know of no case reported that shows the same course of proceeding which has been taken in this, either in Virginia or in the United States.

It is further submitted, the statute presupposes, judging from its language, that the case, 1st, was pending in the court named; 2d, that the jurisdiction of the court *is in issue;* 3d, that the question of jurisdiction alone is certified from the court below for decision; and, judging from the trend of Hechtads *v.* Maynard, I deduce that unless all of these concur the court has no jurisdiction by writ of error or appeal.

The right to either does not exist until that time—and is only attainable by the act of parties. Could the issue be made upon a jurisdictional question after a dismissal and judgment for cost and close of the term? If not, how can we reach the conclusion that the court, unasked at the term of the trial of such an issue, can be required to certify a question of jurisdiction that *is assumed to have arisen in such a trial?* Must this court inspect, upon such an inquiry, transcripts from district and circuit courts, to ascertain the truth, and if there enforce mandamus, the granting of the certificate contemplated by the statute?—a duty which to my mind appears never to have existed or to have devolved upon the court unless asked, *during the trial term*; if asked then, the method presenting the question is speedy, short, and familiar, and the labors of this court in the investigation to ascertain whether a legal duty has been neglected or denied would be reduced to a minimum.

It is further submitted that this is an effort to review by mandamus a matter of PRACTICE of the Circuit and District courts of the United States, upon *the* question of the "time at which a motion for the certificate pro-

vided for by the 5th section, 1st and 2d paragraphs, page 827, Stat. U. S. 1890–'91, chap. 517, 51st Congress, is to be made," and is not proper or permissible, and, therefore, the motion, rule, and writ should be denied. (6 Bacon Abridgt., Title, Mandamus (D), page 438, citing *Ex parte* Morgan, 2 Chit. Rep. 250; High Extraord. Rem., sec. 163; Rex *v.* Essex, 2 Chit. Rep. 385 (b); also 12 Peters 472, tending to support this view.)

It is further submitted that this proceeding seeks to have this court construe a United States statute (sec. 5, paragraphs 1 and 2, U. S. Stat., 1890, '91, page 827) in a proceeding by mandamus against a United States judge who has construed said statute on *petitioner's motion*, but against its view; thus it is sought by mandamus to control the *judicial opinion* which petitioner *invoked*. This is violative of two fundamental rules: First, that a statute may not be thus construed (Sturges *v.* Jay, 2 El. & Bl. 739; High Extraordinary Rem., sec. 154; Potter's Dwarris on Stat. & C., p. 2745 and last part of paragraph, N. 5); and, second, a judge may not thus be required to come to *any prescribed decision* (Rex *v.* Middlesex, 4 B. & Ald. 298; High on Extraord. Rem., sec. 154, 152, 156, and note 1; Goheen *v.* Myers, 18 Ben. Mon. 423; *Ex parte* Johnston, 25 Ark. 614; Davis *v.* County Comr., 63 Me. 396; People *v.* Weston, 28 Col. 639; People *v.* Judges of Dutches Common Pleas, 20 Wend. 658; *Ex parte* Sawyer, 21 Wal. 235; *Ex parte* Flippin, 94 U. S. 348; *Ex parte* Loring, 94 U. S. 418, and other cases; *Ex parte* Perry, 102 U. S. 183; *Ex parte* R. R. Co., 103 U. S. 794). In 102 U. S. 183, above cited, Mr. Chief Justice Waite, delivering the opinion of the court, says: "We cannot, by mandamus, correct the judicial errors committed by an inferior court in the progress of a cause. (*Ex parte* Schawab, 98 U. S. 240.) We can in this way, in a proper case, compel

an inferior court to *act*, but cannot control its *decision while acting*. In the present case it appears that the circuit court *has acted on the motion of the petitioner and denied him what he asked. The object of this proceeding is to obtain from us an order requiring that court to reverse its former decision and grant the relief it has once refused.* That *is* the office of a *writ of error* or an appeal, and *not* of a *writ of mandamus*. (*Ex parte* Flippin, 94 U. S. 248; *Ex parte* Loring, *id.* 418.) * * * In *Ex parte* Whitney, 13 Pet. 404, it was held that a writ of mandamus ought not to be used to correct orders made by a judge in the exercise of his authority, even though such orders 'may seem to bear harshly or oppressively upon the party' complaining." (And see *Ex parte* Railway Co., 103 U. S. 794.) to same effect substantially (*Ex parte* B. & O. R.R. Co., 108 U. S. 566; *ex parte* R.R. Co., 103 U. S. 794; *in re* Penn. Co., 137 U. S. 41–3; 103 U. S. 794), and never allowed to enforce a statutory duty unless it is clear and *indisputable*, and there is no other remedy (127 U. S. 246).

It is further submitted that it is shown by the petition on its face and according to petitioner's statements, that petitioner has had *two* judgments upon *jurisdictional questions* purely, and has neglected to prepare either of them for appeal at the term they were entered (pages 19, 20, 34, and 35 of transcript), but has left each incomplete, and now *ex post facto* ask to have the judge of the *district* (or circuit) *court*, as an over-indulgent mother, gather up their scattered threads, and interweave them by patient and industrious skill into a symmetrical fabric *by a mandamus*. This action of petitioners, I submit, is a waiver, under the circumstances by petitioner recited; indeed, it is such as will conclude petitioner in either proceeding, for it should appear affirmatively that one complaining of a judgment should have at the *proper* TIME and in the PRE-

SCRIBED WAY (where a method is prescribed for reaching an appellate tribunal) pursued the proper remedy. This, I assume, is the current of judicial opinions (16 Peters, 138; Powell on Appellate Proceedings, page 157, sec. 65), and when a party does not do so, but does some act inconsistent with taking advantage by that proper and prescribed method of the appellate proceedings, it *has waived it* (Pow. on Appellate Pro., p. 132, sec. 26, &c.), for it appears just "quilibet potest renunciare juri pro se inducto," and whether a waiver or not, it is *certainly* a bar to a *mandamus*, requiring the judge to do that which he was *not asked to do* within the *proper* time. To hold otherwise is to throw a penalty upon a court. Because the *parties* in a suit *failed* to ask for or try to pursue the method prescribed by statute for obtaining their appeal, but who now seek, never before having asked in proper time *other* privileges, but who have hitherto pursued *other methods;* for what, I know not! certainly if it be, as they now contend, to me it seems, "they have sought by devious paths and have defeated their purpose," for the maxim is, "Qui destruit medium destruit finem." (Co. Lit. 161a.)

It is further submitted that the practice that the certificate "*shall be asked for at the trial term*" is *not* inconsistent with the *words* or spirit of the statute, nor with the practice of the U. S. circuit court in certifying questions under the former statutes and hitherto practised by by these courts. Nor is it inconsistent with the practice in granting bill of exception, which is the most analogous proceeding now remembered.

See Washington *v.* G. A. R.R. Co., 7 Wall. 575.

It is also submitted that the privilege of the writ of error in the case referred to in the petition was one that only became a *right* of petitioners, when a jurisdictional question was in issue, in a case *pending* in the circuit or

district courts of the United States, and when the jurisdictional question *alone* was certified from these courts below for decision. When the case is dismissed, before a certificate was made or asked, it is submitted that it is beyond the power of that court to act authoritatively therein. It would be a certificate made when those sought to be bound are AT LARGE and *not* subject to the process of the court. It might wear a different phase had the court decided in favor of its jurisdiction, for in such a case the persons and *res* would have been before the court. If this court should decide that the the power to act continues a day after dismissal in a cause made final by adjournment of the court for the term, I cannot see why it would not continue two or more years. It is further suggested that the writ of error is not a continuation of the old case, but is a new action, founded upon the errors of the record of the lower court (Powell on Appel. Proc., p. 46, sec. 16), and requires new process to give jurisdiction; but here we are told that after the *dismissal* is final by the close of the term that which is necessary to the jurisdiction of the Supreme Court may be entered. We already know the high and incontrovertible character given by the law to solemn judgments and records of courts; "so that when the court has had jurisdiction of the subject-matter of the action and of the person, and all motions for a new trial or rehearing have been disposed of, and all proceedings in the original suit have come to an end, that the judgment becomes final, then the judgment itself becomes an incontrovertible fact, to be evidenced only by its own record, and to be construed and enforced by its own terms. It admits of no explanation or construction outside of its own record, and that record is to be received as *absolute* verity. Such is the absolute and uncontrollable character of a final judgment, subject *only* to be reviewed and reversed by due

proceedings *in error*." (Pow. on Appel. Proc., page 121, sec. 11, citing Hopkins *v.* Lee, 6 Wheat. U. S. 109; 5 Peter's Cond. R. 25; The King *v.* Carlile, 2 B. & Ald. 362; Whiting *v.* Cochran, 9 Mass. 532.) If, therefore, a certificate which was not a part of the record at that time when the record was closed by the adjournment of the court for the term may be inserted, and upon its insertion operates to resuscitate petitioner's dead privilege and convert it into a living right to have an appeal or writ of error—one that imposes *burdens, liabilities,* and *expenses* upon parties theretofore dismissed from court which had full jurisdiction of parties and subject-matters and dismissed without a right of appeal or writ of error for errors of record as it then rested. And without any certificate thereon that would confer such right, and that, too, when defendant had been dismissed without day, and were by judgment invested absolutely with property rights in the costs awarded them, and were not subject to any action in this august tribunal. Yet they, by such a certificate so made, which they were not required or presumed to have notice of, and after they were so dismissed, and who have since then committed no act which gives this action to petitioners, that yet, by mandamus, all these conclusions of sanctity and finality of records must yield and be subservient to the plaintiff's change in views, and subject to alterations in other ways than by appeal or writ of error, but must yield to the caprice or whim of appellant, notwithstanding the rule that in a case of a private right, there must be a *demand, not in general terms,* but *express, distinct,* and clearly *designating the precise thing desired, untrammeled by any conditions and at a time when, granting it is legally possible* in the opinion of the court appealed to. (High on Extraord. Rem., secs. 13 and 111, notes; *Ex parte* Bec. N. 3 Bar. and Crs., 549a.) "The bill of

exceptions *is to be taken* to be the instrument of the PARTY ASKING IT, and taken most strongly against *the party* CLAIMING IT * * * and cannot be supplied by INTENDMENT *of the court*. (Powell on Appellate Proceedings, p. 240, § 42, and reference note 4; 7 Cranch, 270). "Omnia præsumuntur rita esse acta." (Coke, Litt.) And, further, the maxim is: "*Stabit præsumptio donec probatur in contrarium.*" (Coke, Litt., 373.)

As to construction of the words of the act of the 51st Cong., chap. 517, sec. 571, I refer to Potter's Dwarris on Stat., &c., 274–275, note 5, last clause; 6 Bacon's Abridgt., Title Stat. I.

The suggestion that there is no other remedy is immaterial does not of itself entitle the petitioner to this remedy by mandamus. (High Extraord. Rem., secs. 19 and 20 and cases cited.)

The proceeding by *certiorari* is open, applicable, and complete if the petitioner's contention is correct; there being another remedy at law, the court has none by mandamus. (High Extraord. Rem., secs. 19 and 20 and cases cited; Hains *v.* Barber, 129 U. S. 366.)

That as this is not in aid of the appellate jurisdiction, and ancillary to a case pending, the original jurisdiction of the writ is excluded by Art. III, sec. 2–4, Const. U. S. (127 U. S. 771.)

Judgment of an inferior court upon a motion to amend its judgment in the original cause cannot be reviewed by mandamus. (114 U. S. 174; *Ex parte* Morgan, *Ex parte* Hoit, 13 Pet. 279.)

No *prima facie* case is shown. (14 Howard, 3; 11 Peters, 173.)

F. S. BLAIR,
C. T. DUNCAN, AND
H. L. K. MORISON,
Att'ys for Defendant.

SUPREME COURT OF THE UNITED STATES.

The Lehigh Manufacturing Company

vs.

Hon. John Paul, Judge.

On Motion to file a Petition for *Mandamus.*

OBJECTIONS TO SAID MOTION:

AND

EXCEPTIONS TO SAID PETITION.

I.

This is an effort on the part of the petitioners, to substitute a proceeding by mandamus, for an ordinary writ of error, and thus to obtain a review, by this appellate court, of the final judgment at law, rendered in this case, at the May term, 1894, of the United States Circuit Court for the Western District of Virginia, in the action of ejectment of the said Lehigh Mining and Manufacturing Co. vs. J. J. Kelly et. al, in which a *final judgment* was rendered, *at that term* for said defendants in ejectment, and from which no writ of error has been taken.

II.

There was an action of ejectment pending in court below of petitioners vs. J. J. Kelly et al.: the defendants filed pleas that the jurisdiction of the court was obtained by fraud and collusion on part of the petitioners : issue was joined on the pleas, proof heard, and the court sustained the pleas, dismissed the action, and entered up a final judgment for the defendants therein.

Being a jurisdictional question, under the late judicary law(Evart's Law) the writ of error was to this court—and as a condition precedent to the enjoyment of such jurisdiction here, it was necessary for the petitioners to have asked for, and obtained from the court below a certificate of jurisdiction that case was adjudged on that point alone, and the facts upon which the court had based its decision. No such certificate was asked for by petitioners during *that* term, but they permitted that term, at which the *final* judgment was rendered, to expire, without even applying for such certificate, and at the next term of that court—six months afterwards—October term, 1894, they appeared in court and, for the first time, applied for the certificate of facts upon which the court had based its judgment. This was refused by the court, because it was too late. The term at which the final judgment was rendered had expired : the case was off the docket, the parties were dismissed, and all jurisdiction of the case, for these reasons, had ended. Now, by the motion and petition for mandamus, the petitioners, who

were negligent in asking for the certificate in time, seek to compel the honorable judge below, to sign the certificate named.

III.

The certificate is nothing more than a bill of exception. It is a bill of exceptions to ruling of the court in sustain- the pleas, and dismissing the suit and sets forth the *facts* upon which the judgment was founded, and the honorable judge below had lost all possible control of the parties and all jurisdiction of the case, after the adjournment of the term at which the final judgment was rendered, and he had no power or authority to add to, supplement, or change the record in the case by any proceeding six months afterwards.

IV.

This petition for mandamus seeks to review a question of practice in the Circuit Court of the United States for the Western District of Virginia, which is not permissible.

There is *no* statute regulating the time, within which such certificate shall be signed; but in many circuits it can by rules of practice, be signed during the term, or, by an order for extension of time, at a later date, or by stipulation of parties, it may be signed at an agreed time. But no such rule of practice has ever been adopted in the court below, and by analogy to bills of exception, of which it is a species, it must be signed at same term at which the final judgment is rendered.